Supreme Court, U.S.
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No. 02-1668

IN THE

Supreme Court of the United States

CLIFFORD L. VAN SYOC, ESQUIRE,

Petitioner,

v.

HOUSING AUTHORITY AND URBAN REDEVELOPMENT AGENCY OF THE CITY OF ATLANTIC CITY, a New Jersey municipal corporation; JOHN GLOWACKI; JOHN J. McAVADDY, JR.; and JOHN P. WHITTINGTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS FOR REVIEW

1. Whether the District Court properly ordered, and the Court of Appeals properly affirmed the award of attorneys' fees pursuant to 28 U.S.C. § 1927 against an attorney who callously disregarded his obligations to the court, his adversary and his client where the decision is supported by the undisputed record and applicable legal principle, is not inconsistent with decisions by other United States courts of appeal, and does not implicate the Court's supervisory power.

2. Can Petitioner challenge the amount of fees and costs the District Court properly awarded, and the Court of Appeals properly affirmed, where Petitioner failed to challenge the amount of attorneys' fees and costs sought before the District Court.

3. Whether the amount of the District Court's award of attorneys' fees and costs incurred as a result of Petitioner's continued prosecution of claims which he knew had no factual or legal basis was appropriate where the District Court performed a thorough analysis of the fees and costs sought, awarding some, but not all, of the fees and costs requested.

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STATEMENT OF THE CASE

Petitioner, Clifford Van Syoc, Esquire ("Petitioner" or "Van Syoc"), an experienced attorney who represents plaintiffs in civil rights/employment discrimination cases on a daily basis, represented Todd Murphy, a white male, and his wife Roseann Murphy (hereinafter "Plaintiffs") in a discrimination suit against Mr. Murphy's employer, the Housing Authority and Urban Redevelopment Agency of the City of Atlantic City, and Mr. Murphy's supervisors John Glowacki, John J. McAvaddy, Jr. and John P. Whittington (collectively "Respondents"). From the beginning of the case, it was clear that there was no legal basis for Plaintiffs' claims. Plaintiffs' claims of discrimination were: (1) Respondents' denial of Mr. Murphy's request to raise his salary over 60 percent from $30,794.14 to $50,375.00; and (2) Respondents' denial of Mr. Murphy's request to attend and be reimbursed for municipal finance classes that did not apply to Mr. Murphy's job title and were not required for the performance of Mr. Murphy's duties.[1] *Murphy v. Housing Auth. and Urban Redevelopment Agency of the City of Atlantic City*, 32 F. Supp. 2d 753, 757-58 (D.N.J. 1999) ("Murphy Summary Judgment"). It was also clear from early on in the litigation, that Plaintiffs' factual allegations were simply wrong and there were no facts that supported Plaintiffs' claims. Despite this, Petitioner continued to prosecute claims that he knew or should have known were without basis.

Respondents filed a motion for summary judgment on August 17, 1998. (JA 92 *et seq.*) On January 27, 1999, the District

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1. Contrary to statements in the Petition (*see Pet.* at pp. 1-2), requests such as Plaintiff's have never been routinely granted and were denied to Plaintiff because they were not warranted or appropriate, not to "make a stand." (JA 92 *et seq.*)

Court issued an opinion and order granting Respondents' motion for summary judgment on all counts holding:

> I shall grant the Defendants' motion for summary judgment on Counts I, II, and IV of the Amended Complaint because Murphy cannot establish a prima facie case of unlawful reverse discrimination in violation of Title VII or the New Jersey Law Against Discrimination ("NJLAD") *AND, ALTERNATIVELY*, because Murphy has failed to produce *even a scintilla of evidence* tending to show that the Defendants' proffered nondiscriminatory reasons for the adverse employment decisions were merely a pretext for invidious discrimination. In addition, I shall grant Defendants' motion for summary judgment on Count III of the Amended Complaint because *per quod* claims are not cognizable in cases involving claims of employment discrimination in violation of Title VII and the NJLAD, and because as a derivative claim, a *per quod* claim cannot survive if the underlying claim fails. (Emphasis added).

Murphy Summary Judgment, 32 F. Supp. 2d at 755. This decision was affirmed by the Court of Appeals for the Third Circuit. *Murphy v. Housing Auth. and Urban Redevelopment Agency of the City of Atlantic City*, 208 F.3d 206 (3d Cir. 2000).

The Respondents filed a request for reimbursement of attorneys' fees and costs against Plaintiffs and Petitioner pursuant to 42 U.S.C. § 1988 and 28 U.S.C. § 1927[2] in February 1999. (JA 444). On August 27, 2001, the United States District Court for the District of New Jersey granted Respondents' request in part finding that

2. Contrary to Petitioner's claims at page 2, there was nothing improper about defendants' request for counsel fees and expenses.

Petitioner had "callously disregarded his professional obligations to this Court, his adversary, and his clients . . . has in bad faith turned a blind eye to the facts and law and has unreasonably and vexatiously multiplied the proceedings in the case." *Murphy v. Housing Auth. and Urban Redevelopment Agency of the City of Atlantic City*, 158 F. Supp. 2d. 438 (D.N.J. 2001) ("Murphy Fees") (App. B to Pet.).[3] Respondents' request for fees against Plaintiffs was denied. *Id.* The Third Circuit affirmed the District Court's decision finding Petitioner's claims of abuse of discretion and clear error "specious." *Murphy v. Housing Auth. and Urban Redevelopment Agency of the City of Atlantic City*, Nos. 01-3426 and 01-3572 (3d Cir. Oct. 16, 2002) (App. A to Pet.). The Third Circuit specifically affirmed the District Court's finding that Petitioner had acted in bad faith. *Id.*

On November 12, 2002, the Third Circuit also granted, in part,[4] Respondents' application for fees and costs pursuant to Federal Rule of Appellate Procedure 38. These fees and costs related to defense of Petitioner's appeal of the August 27, 2001 Opinion and Order awarding fees pursuant to § 1927. Contrary to Petitioner's statement in the Petition at page 3, this Order was not issued before Petitioner's response was due. In fact, Petitioner filed a response to Respondents' motion on November 12, 2002.

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3. The District Court did not "expressly den[y] defendants' application for attorney's fees and costs in connection with the appeal," but deferred the decision on those fees to the court of appeals. *Murphy Fees*, 158 F. Supp. 2d at 451 n.3.

4. Respondents requested $33,431.96 in fees and costs incurred as a result of Petitioner's frivolous appeal. The Third Circuit awarded $15,000.00 in fees and $3,698.46 in costs.

REASONS FOR DENYING THE PETITION

Forsyth v. City of Hammond, 166 U.S. 506 (1897), cited in the Petition at page 5 does not support granting the Petition. In *Forsyth*, this Court reaffirmed the uncontroversial position that "the power of this court in certiorari extends to every case pending in the circuit courts of appeal and may be exercised at any time during such pendency." *Id.* at 514. The Court went on to recognize another uncontroversial position, that

> it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise.

Id. at 514-15. None of those circumstances are present here. First, there are no inconsistent decisions between the Third Circuit and any other courts of appeals on the issues raised in the Petition. Second, the lower courts' decisions were consistent with previous precedent and do not require this Court to exercise its supervisory power. Finally, there are no matters of national interest or exceptional importance implicated in the writ requiring this Court's attention.[5]

5. Petitioner's citation to *Patton v. Yount*, 467 U.S. 1035 (1984) is curious since that case has no relevance to the matters raised in the Petition. Furthermore, there has been no showing that the matters raised in the Petition, specifically whether the award of attorneys' fees and costs against Petitioner pursuant to 28 U.S.C. § 1927 are "important and recurring." While it may be true that courts are "flooded with civil rights claims arising under 42 U.S.C. § 1983" (*see Pet.* at p. 8), it is not true that those cases necessarily implicate the imposition of sanctions under 28 U.S.C. § 1927. The fee-shifting procedure under 42 U.S.C. § 1988 is not at issue here. What is at issue is the imposition of sanctions against an attorney who unreasonably and vexatiously multiplies the proceedings. *See* 28 U.S.C. § 1927.

As noted in this Court's rules, "a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *See* Rule 10. Petitioner's assertions are essentially that the lower courts misapplied the law to the specific facts. As set forth herein, this is not the case and this is not one of those rare circumstances requiring this Court's attention.

I. Petitioner's Discussion Of And Reliance Upon An Attorney-Client Communication Is Improper And Should Be Rejected By This Court.

Despite repeated demands by defense counsel and previous instructions from the District Court, Petitioner continues to disclose and rely upon an attorney-client communication between Respondents' counsel and Respondents' insurance carrier. *See* App. D to Pet. There is no doubt that the correspondence is privileged.[6] There is also no doubt that Petitioner's continued discussion and reliance[7] upon the document is improper.

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6. Petitioner initially claimed the communication fell within the "crime/fraud exception" (JA 50- JA 53). This argument was specious at best and was properly rejected by the District Court. *Id.*; *see also Murphy v. Housing Auth. and Urban Redevelopment Agency of the City of Atlantic City*, CA. No. 97CV1558 slip. op. (D.N.J. Feb. 28, 2002).

7. Petitioner has not only filed the correspondence with this Court, but also with the Third Circuit Court of Appeals and the United States District Court for the District of New Jersey. Petitioner has also disclosed the contents of the attorney-client communication to members of the press. *See* Respondents' Motion for Sanctions filed Sept. 19, 2001, *Murphy v. Housing Auth.*, No. 97CV1558 (D.N.J); Tim O'Brien, *For "Rambo" Tactics in Tossed Case, Judge Assesses Attorney $59,216*, NEW JERSEY LAW JOURNAL, Sept. 3, 2001 at p. 13; and Charles Toutant, *Bad-Faith Appeal Costs Lawyer $58,000*, NEW JERSEY LAW JOURNAL, Oct. 28, 2002 at p. 5.

On February 28, 2002, the District Court issued an opinion denying Respondents' request for further sanctions against Petitioner based on the limited record before it. However, the District Court went on to state:

> I do not mean to intimate approval of Mr. Van Syoc's behavior. The only precaution Mr. Van Syoc took before filing an **obviously privileged communication** with this Court, the Court of Appeals, and freely discussing its contents with the press, was to consult with 'ethics counsel' and conclude that the crime/fraud exception lifted the cloak of confidentiality. . . . Such a conclusion is not supported by the case law . . . nor by the contents of the letter in question. The far wiser, more professional, and ethical course of action would have been to 'refrain from examining the materials, notify the sending lawyer, and abide by the instructions of the lawyer who sent them.' . . . Although I cannot impose sanctions on Mr. Van Syoc in this instance, **I strongly urge him to remedy his ethical lapse by returning the letter to Defendants' counsel and to refrain from referring to or using the letter or its contents in the future.** (emphasis added).

Id. at p. 11-12 (internal citations omitted). Despite this directive, Petitioner has not "remed[ied] his ethical lapse," but compounded it by filing the privileged communication with this Court as an appendix to the Petition.

Furthermore, Petitioner's arguments regarding the correspondence are factually inaccurate. At no time did Respondents' counsel stray from his position that Plaintiffs' claims were without merit and would ultimately be defeated. *See* JA 92 *et seq.*, JA 444, *et seq.*, JA 718, 748. At each settlement conference and in each correspondence with Petitioner,

Respondents' counsel made this position clear. *Id.* In addition, the letter, which was written *after* all of Plaintiffs' claims were dismissed by the District Court and while the dismissal was pending before the Third Circuit, does not say the case has a 50/50 chance to go to the jury. *See* App. D to Pet. The correspondence sets forth various possibilities given the Third Circuit's decision in *Iadimarco v. Runyon*, 190 F.3d 151 (3d Cir. 1999) and sets forth estimates of the likelihood of each scenario.[8]

II. There Is No Dispute Between The Third Circuit and Other Courts of Appeal.

Petitioner appears to claim the lower court's opinions are inconsistent with decisions of another United States Court of Appeal. *See Pet.* at pp. 5-7. However, Petitioner does not identify which circuits he claims have issued opinions inconsistent with the Third Circuit's opinion in this case or how those decisions are inconsistent. *Id.* On page 11 of the Petition, Petitioner claims that *Williams v. Giant Eagle Markets*, 883 F.2d 1184 (3d Cir. 1989) and *Hackman v. Valley Fair*, 932 F.2d 239 (3d Cir. 1991) were applied in an Eleventh Circuit case, *McMahan v. Toto*, 256 F.3d 1120 (11th Cir. 2001), *cert. denied*, __ S. Ct. __, 2003 WL 159312, and by district courts in Louisiana, Nebraska and California. However, none of the decisions cited by Petitioner even mention *Williams* or *Hackman*.

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8. Petitioner claims, without citation, that Respondents' counsel "misrepresented his own appraisal of the merits just to obtain an award of sanctions." *Pet.* at p. 9. There is no support in the record for this proposition. Respondents' counsel has consistently argued that plaintiffs' claims were without legal or factual basis. *See, e.g.*, Respondents' Motion for Summary Judgment (JA 92 *et seq.*); Respondents' Application for Counsel Fees (JA 444 *et seq.*) and related documents.

Furthermore, the lower courts' decisions in this case are not inconsistent with Eleventh Circuit precedent. For example, in *Bryne v. Nezhat*, 261 F.3d 1075 (11th Cir. 2001), the Eleventh Circuit upheld an award of sanctions against an attorney who "filed a frivolous lawsuit, in bad faith, for the purpose of extorting a settlement from the defendants." *Id.* at 1117. *Bryne* was a "garden variety medical malpractice claim." *Id.* at 1115. However, plaintiff brought a multi-count complaint alleging, *inter alia*, fraud, mail fraud, battery and violations of the Georgia RICO statute. *Id.* All of the claims (except the medical malpractice claims) were without factual and/or legal basis. *Id.* at 1115. The Eleventh Circuit held that "by expanding her case to include the RICO charge and the other baseless claims [the attorney] subjected himself to sanctions." *Id.* Another example is *Avirgan v. Hull*, 932 F.2d 1572 (11th Cir. 1991), *cert. denied*, 502 U.S. 1048 (1992), where the Eleventh Circuit upheld awarding fees against attorneys who "willfully abuse[d] judicial process by conduct tantamount to bad faith." *Id.* at 1582. In so doing, the Eleventh Circuit held that it was "well established that: . . . '[w]hen it becomes apparent that discoverable evidence will not bear out the claim, the litigant and his attorney have a duty to discontinue their quest.'" *Id.* (*quoting Collins v. Walden*, 834 F.2d 961, 965 (11th Cir. 1987)). When counsel continued to litigate claims that discovery revealed were without basis, he was ordered to pay fees and costs pursuant to § 1927. *Id.*

McMahan v. Toto, 256 F.3d 1120 (11th Cir. 2001), does not change this analysis. In *McMahan*, plaintiffs' counsel relied on language in a previous case, which the district court found was "not entirely clear, and actually [did] offer some support for [plaintiffs'] interpretation of that opinion, although not enough to convince us their interpretation is correct." *Id.* at 1129. Thus, the Eleventh Circuit held that it was not an abuse of discretion for the district court to refuse to award sanctions under § 1927.

Id. McMahan is distinguishable because the district court in that case twice denied summary judgment before concluding that plaintiff's reading of the earlier precedent was wrong. *Id.* That is clearly distinguishable from this case wherein the district court granted Respondents' motion for summary judgment finding that Plaintiffs had failed to come forward with a scintilla of evidence to support their claims.

The remaining cases cited by Petitioner, *Adams v. Autozoners, Inc.* No. 99-2336, 2000 WL 235240 (E.D. La. Feb. 29, 2000), *Hall v. Hormel Foods, Corp.*, No. 8:98cv304, 2000 WL 1062103 (D. Neb. July 20, 2000) and *Glad-A-Way, Inc. v. Lynn Mayer's Great Lakes Glads, Inc.*, No. 5-93-239, 1994 WL 69467 (N.D. Cal. Feb. 23, 1994) are not decisions by United States courts of appeal. Contrary to Petitioner's claim, this Court need not grant a writ of certiorari where there may be a dispute among district courts. *See Pet.* at p. 7. Accordingly, Rule 10(a) is not implicated by those decisions. Furthermore, *Adams*, *Hall* and *Glad-A-Way, Inc.* are not inconsistent with the lower courts' decisions in this case.

III. The Lower Courts' Opinions Were Consistent With Previous Precedent And Do Not Warrant This Court's Attention.

The lower courts' decisions are also consistent with prior Third Circuit precedent. The District Court correctly identified the governing standards of law[9] for determining whether fees are appropriate under 28 U.S.C. § 1927 and applied those standards

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9. Petitioner claims that "whether plaintiff had made a 'colorable claim' of employment discrimination" is "another applicable standard." *Pet.* at p. 14. Neither case cited by Petitioner supports an alternative basis for avoiding liability under § 1927. In both *Campana v. Muir*, 615 F. Supp. 871 (E.D. Pa. 1985), *aff'd*, 786 F.2d 188 (1986) and *Hackman v. Valley Fair*, 932 F.2d 239, 243 (3d Cir. 1991), the courts applied the same standards as were utilized in this case.

to the specific facts of this case. *See e.g.*, *Murphy Fees*, 158 F. Supp. 2d at 445-47. The District Court made a specific finding of bad faith:[10]

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10. Petitioner's claim that "the lower Courts made no express finding of [bad faith]," *Pet.* at p. 10, is simply false. Clearly, a specific finding of bad faith was made by the District Court and affirmed by the Court of Appeals. Furthermore, Petitioner's repeated claims that the Third Circuit affirmed the District Court's opinion without analysis, *Pet.* at pp. 10, 11, 12, are also false and implies that an appellate courts standard of review is plenary, which is incorrect. A court of appeals reviews the grant of attorneys' fees under 28 U.S.C. § 1927 pursuant to an abuse of discretion standard. *Baker Industries, Inc. v. Cerberus Ltd.*, 764 F.2d 204, 210 (3d Cir. 1985). As the Eleventh Circuit has noted,

> [t]he abuse of discretion standard of review recognizes that for the matter in question, there is a range of choice for the district court and so long as its decision does not amount to a clear error of judgment [the appellate court] will not reverse even if [the appellate court] would have gone the other way had the choice been ours to make.

McMahan v. Toto, 256 F.3d 1120, 1128 (11th Cir. 2001). "[I]f reasonable [people] could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." *MCI Telecommunications Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1102 (3d Cir. 1995), *cert. denied*, 519 U.S. 815 (1996) (quoting *Silberman v. Bogle*, 683 F.2d 62, 65 (3d Cir. 1982)). It is only where "no reasonable [person] would adopt the district court's view" that the appellate court can find an abuse of discretion. *Id.* Further, a district court's finding of willfulness on the part of counsel is a finding of fact that is subject to reversal only if clearly erroneous. *Baker*, 764 F.2d at 210. This standard requires the appellate court "to pay deference to the district court's interpretation of the factual record before it." *Id.* Once a finding of willfulness has been made, the appropriateness of assessing attorney's fees against counsel under § 1927 is a matter for the district court's discretion. *Id.*

> Applying these standards to Mr. Van Syoc's conduct during the course of this lawsuit, I conclude that he acted in bad faith by 'multipl[ying] the proceedings in [this] case unreasonably and vexatiously.' 28 U.S.C. § 1927. I base this conclusion on the following considerations: (1) Mr. Van Syoc's pursuit of baseless claims, the frivolous nature of which he should have been aware by, at the latest, the Defendants' filing of their motion for summary judgment on August 17, 1998; and (2) Mr. Van Syoc's assertion of Roseann Murphy's *per quod* claim under the New Jersey Law Against Discrimination, N.J.S.A. § 10.5-1 *et seq.*, and Title VII, 42 U.S.C. § 2000e *et seq.*, when both federal and New Jersey state courts had already held that *per quod* claims were not cognizable under either of those sources of law.

Id. at 445-47. This finding was affirmed by the Court of Appeals. *Murphy v. Housing Auth.*, Nos. 01-3426 and 01-3572 (3d Cir. Oct. 16, 2002).

This decision was wholly consistent with *Ford v. Temple Hospital*, 790 F.2d 342 (3d Cir. 1986), where the Third Circuit held that although plaintiff's *initiation* of the complaint in violation of the statute of limitations was not in bad faith or frivolous, the continuance of the litigation after the motion for summary judgment was filed was in bad faith and subjected the attorney to sanctions pursuant to § 1927. *Id.* at 349, 350 (*emphasis in original*); *see also Loftus v. Southeastern Pennsylvania Transp. Auth.*, 8 F. Supp. 2d 458, 459 (E.D. Pa. 1998), *aff'd*, 187 F.3d 626 (3d Cir. 1999), *cert. denied*, 528 U.S. 1047 (1999) (sanctions appropriate where attorney continued litigation after it became frivolous) and *Hicks v. Arthur*, 891 F. Supp. 213, 215 (E.D. Pa. 1995), *aff'd*, 91 F.3d 123 (3d Cir. 1996) (same).

Furthermore, *In re Prudential Insurance Company*, 278 F.3d 175, 190 (3d Cir. 2002), does not set new or different standards for applying 28 U.S.C. § 1927, but applies the four requirements which are "evident from the text of the statute." *Id.* at 188 (*citing Williams v. Giant Eagle Markets*, 883 F.2d 1184, 1191 (3d Cir. 1989). *In re Prudential* supports the imposition of fees and costs pursuant to § 1927 where an attorney litigated in a "vexatious manner" "multipl[ing] the proceedings at nearly every turn, and increas[ing] the cost of this litigation." *Id.* at 190. In so doing, the Third Circuit stated: "[i]ndications of bad faith are findings that the claims advanced were meritless, that counsel knew or should have known this, and that the motive for filing the suit was for an improper purpose such as harassment." *Id.* at 188 (*quoting Smith v. Detroit Fed'n of Teachers Local 231, Am. Fed. of Teachers, AFL-CIO*, 829 F.2d 1370, 1375 (6th Cir. 1987)). Similarly, in this case, the Third Circuit affirmed the District Court finding that:

> Clifford L. Van Syoc, Esquire, has in bad faith turned a blind eye to the facts and law and has unreasonably and vexatiously multiplied the proceedings in this case. The record reveals that Mr. Van Syoc continued to pursue this lawsuit even when it became clear that there was no basis in law or fact upon which his clients could prevail. While the Rules of Professional conduct impose a duty upon attorneys to represent their clients' interests zealously, Mr. Van Syoc's zeal in this case had more to do with the recovery of his counsel fees than the merits of his clients' claims.

Murphy Fees, 158 F. Supp. 2d at 441. The District Court, which was readily familiar with the facts and circumstances involved in this litigation, having managed it on "the front lines" since 1997, found that Petitioner multiplied the proceedings by continuing

this litigation after it was clear that it had no merit in an unreasonable and vexatious manner, thus increasing the costs of the proceedings with the motive not of serving his clients, but of securing his own counsel fees. *Id.* This holding is consistent with *In re Prudential*, 278 F.3d at 187.

The lower court decisions are also consistent with *Mone v. C.I.R*, 774 F.2d 570 (2d Cir. 1985).[11] In *Mone*, the Second Circuit awarded fees against an attorney who raised arguments that were wholly without merit. *Id.* at 574-75. The lower courts found Petitioner also argued claims that had no legal or factual support. *Murphy Fees* at 158 F. Supp. 2d at 449-50. Accordingly, those decisions are consistent with *Mone*.

Furthermore, the District Court and Court of Appeals decisions are not inconsistent with *Williams v. Giant Eagle Markets*, 883 F.2d 1184 (3d Cir. 1989) or *In re Orthopedic Bone Screw Products*, 193 F.3d 781 (3d Cir. 1999), which are factually distinguishable. In *Williams*, the district court sanctioned an attorney for bringing suit because the attorney "knew or should have known that plaintiff's insubordinate conduct caused her discharge and not her race." *Id.* at 1191. The court of appeals reversed, finding the district court's reasoning "untenable since disproving insubordination is not part of a plaintiff's *prima facie* case." *Id.* In this case, the discovery process, including document discovery and depositions, established that the factual basis for Plaintiffs' claims simply did not exist. At his deposition, Mr. Murphy reviewed the payroll summaries of each of the individuals that he claimed obtained special treatment and he

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11. Petitioner claims without explanation that the Third Circuit's imposition of fees "fl[ew] in the face of its own prior decisions" including *Mone*. *Pet.* at p. 10. Petitioner's claim is unsupportable and *Mone* is not a prior decision of the Third Circuit, but was decided by the Second Circuit.

was unable to identify any discrepancies that would indicate that any of those individuals received pay raises for reasons other than legitimate business reasons such as those set forth in Murphy's own payroll records. (JA 133-34). Even after learning that the facts upon which they based the Amended Complaint did not exist, Plaintiffs and Petitioner refused to discontinue the litigation.

Furthermore, in *In re Orthopedic Bone Screw Products*, the district court refused to sanction an attorney for pleading the "fraud-in-the-market" theory, which developed in securities cases, in a multidistrict litigation involving allegedly defective bone screw implantation devices and claims that certain medical associations conspired with manufacturers, finding that there were unresolved questions of fact (which precluded dismissal of the claims pursuant to Fed. R. Civ. P. 12(b)(6)). *Id.* at 784-85, 796. That case is distinguishable because the Petitioner was not making a good faith attempt to expand existing caselaw and because there were no disputes of fact that precluded dismissal in this case.

In addition, here Petitioner continued to make outrageous settlement demands,[12] which were not present in *Williams* or *In re Orthopedic Bone Screw Products* distinguish this case. In fact, the attorneys in *In re Orthopedic Bone Screw Products* in response to the court's Rule 11 concerns, provided a 750-

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12. Although Petitioner claims the District Court improperly considered his settlement positions in making its decision, Petitioner has failed to offer any legal citation to support those claims. Federal Rule of Evidence 408 only prohibits use of settlement positions for determinations of liability and damages in the main case – not a subsequent fee petition. In fact, there is nothing improper in the District Court's consideration of evidence regarding Petitioner's motivation in making its determination of whether Petitioner acted in bad faith.

page particularized statement of facts with exhibits explaining the basis for their claims and obtained the court's approval of a form amended complaint prior to forwarding the amended complaint to various plaintiffs' attorneys for modification. *Id.* at 796. While this "was not dispositive, we believe it strongly supports the District Court's determination that plaintiffs' counsel did not act in bad faith; to the contrary, they responded to the court's request to cure potential defects in the complaints before proceeding further." *Id.* at 796.

Contrary to Petitioner's claims, the District Court did not impose fees against Petitioner simply because-he "merely defended a weak claim," (*Pet.* at p. 11) or because he opposed summary judgment, (*Pet.* at p. 4). The District Court ordered, and the Court of Appeals affirmed, the imposition of fees because Petitioner violated his professional obligations by continuing to litigate claims that had "no basis in law or fact." *Murphy Fees*, 158 F. Supp. 2d at 441. Furthermore, the District Court did provide guidance to counsel who litigate civil rights cases which provide for fee-shifting, namely not to disregard their professional obligations; not to turn a blind eye to the facts and law to pursue claims even when it has become clear that the claims have no basis and not to be motivated more by the recovery of counsel fees than the merits of their clients' interests. *See, e.g., Murphy Fees*, 158 F. Supp. 2d at 441.

IV. There Are No Compelling Reasons For Granting The Writ.

As set forth above, this case is not one of national importance that requires the Court's attention. Respondents will not restate the arguments made above, but will address a few specific arguments raised in the Petition.

A. The Lower Court Opinions Do Not Threaten to Chill Litigants or Attorneys From Bringing Legitimate Civil Rights Claims.

Nothing in the Third Circuit or the District Court's decisions should be of concern to responsible attorneys who legitimately and zealously defend their client's rights. The actions that the District Court and the Third Circuit found to be in bad faith were Petitioner's "Rambo" activities that were in total disregard of his professional obligations to the court, other members of the bar and his clients. *Murphy Fees*, 158 F. Supp. 2d at 441. The crux of the Court's decision was that "Van Syoc's zeal in this case had more to do with the recovery of his counsel fees than the merits of his clients' claims." *Id.*

Attorneys are protected because courts must make a specific finding of bad faith before fees will be assessed against them. *Baker Industries v. Cerberus Ltd.*, 764 F.2d 204, 209 (3d Cir. 1985). The purpose of this requirement is to protect attorneys from awards of fees for simple errors. *Id.* "If it were otherwise, an attorney who might be guilty of no more than a mistake in professional judgment in pursuing a client's goals might be liable for excess attorney's fees under § 1927." *Id.* This requirement was also recognized in the legislative history of the 1980 amendment to § 1927 where the conference report of the House and Senate stated "[t]he high standard which must be met to trigger 1927 insures that the provision in no way will dampen the legitimate zeal of an attorney representing his client." *See Joint Explanatory Statement of the Comm. of Conference*, 96th Cong. 2d Sess. 8, *reprinted in* 1980 U.S.C.C.A.N. 2781. Thus, attorneys who simply make mistakes or ultimately are not successful in the litigation, but meet their professional obligations and do not act in bad faith, will not be sanctioned pursuant to § 1927. However, defendants, the public

and the judicial system will be protected from attorneys, such as Petitioner, who "callously disregard their professional obligations."

The lower court decisions were also not a failure to apply *Hackman v. Valley Fair*, 932 F.2d 239 (3d. Cir. 1991), which is distinguishable from this case. *See Pet.* at p. 11. In *Hackman*, the plaintiff sued his union for breach of the duty of fair representation. *Id.* at 239. At his deposition, the plaintiff made statements that were extremely detrimental to his claim. *Id.* at 240-41. In opposing a motion for summary judgment, the plaintiff submitted an affidavit contending that he was confused at his deposition. *Id.* at 243. The Third Circuit held that the district court properly rejected the plaintiff's affidavit and granted summary judgment, but that the court had erred in assessing fees against plaintiff's attorney under § 1927. In *Hackman*, the plaintiff's attorney stated that she had explained to the plaintiff that his deposition was detrimental to his case and that after discussions with plaintiff advising him that his deposition was detrimental, the attorney determined that the case was initially brought, and was being continued, in good faith. *Id.* at 242. The attorney also stated that she believed it was her ethical obligation to continue representing her client and to present his position to the court. *Id.* The Third Circuit recognized that "conduct by an attorney in the circumstances here did not breach, but rather was consistent with the duties of professional responsibility in assisting the Court to resolve the litigation." *Id.* at 243. Because of the attorney's actions in advising her client that his deposition had been detrimental to his case, this Court found that it was clearly erroneous to assess fees against the attorney pursuant to § 1927. *Id.* Thus, in order to avoid being liable for fees, an attorney must simply do what he/she is already obligated to do under the Rules of Professional Conduct. The District Court found that Petitioner did not meet his

professional obligations, but "callously disregarded" them. *Murphy Fees*, 158 F. Supp. 2d at 441.

Petitioner claims, without any legal citation, that "where, as here, counsel must wrestle with 'pretext analysis,' no such finding of 'bad faith' can lie," must be rejected. *Pet.* at pp. 12-13. First neither the language of 28 U.S.C. § 1927, nor the legislative history of the statute, provides any exception for employment discrimination cases or for cases involving "pretext analysis." *See* 28 U.S.C. § 1927; *Joint Explanatory Statement of the Comm. of Conference*, 96th Cong. 2d Sess 8, *reprinted in* 1980 U.S.C.C.A.N. at 2781. Secondly, other statutes, including 42 U.S.C. § 1988 permit awarding attorneys' fees to prevailing defendants as well as prevailing plaintiffs. *See* 42 U.S.C. § 1988. As this Court noted in reviewing the legislative history of § 1988 statute, Congress "wanted to protect defendants from burdensome litigation having no legal or factual basis." *Christianburg Garmet Co. v. EEOC*, 434 U.S. 412, 420 (1978). Pretext analysis must be performed in virtually all employment discrimination cases and experienced counsel such as Petitioner cannot later hide behind that shield. Accordingly, Petitioner's argument is without merit.

Petitioner's argument that his behavior should be excused because of the evolving nature of employment discrimination law should also be rejected. While arguably there are certain aspects of employment discrimination law – as well as all areas of law – which are evolving, none of those areas gave Plaintiffs' meritless claims any hope of success. The requirement that plaintiffs in such cases establish that they were subject to an adverse employment action, and that the actions were not because of a legitimate business purpose but rather were for the discriminatory reasons alleged, is well-settled and at the core of the New Jersey

Law Against Discrimination and Title VII.[13] *See, e.g., St. Mary's*, 509 U.S. 502; *Lehmann v. Toys 'R Us, Inc.*, 626 A.2d 445 (N.J. 1993). Furthermore, it is equally clear that *per quod* claims are not recoverable in discrimination cases. *See Catalane v. Gilian Instrument Corp.*, 638 A.2d 1341 (N.J. App. Div. 1994).[14] Of course, it is axiomatic that loss of consortium claims are derivative claims that fail as a matter of law if the related claims fail. *Tichenor v. Santillo*, 527 A.2d 78 (N.J. App. Div. 1987).

Petitioner, a seasoned employment attorney, clearly knew or should have known these basic legal principles. From the beginning of this litigation, it was clear that Plaintiffs could not establish that the reasons provided by Respondents for their employment decisions were merely a pretext. It was clear, from

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13. Section 1983 civil rights claims are analyzed under the same burden-shifting analysis. *St. Mary's Honor Center*, 509 U.S. 502 (1993).

14. The district noted:

> [a]ny potential assertion by Mr. Van Syoc that he was unaware of the state of the law at the time he filed Plaintiffs' claims is belied by the fact that he himself was counsel for the plaintiffs in *Hurley v. Atlantic City Police Dep't*, 1995 WL 854478 (D.N.J. 1996), a case in which my colleague, Judge Irenas, flatly rejected an identical claim. *See Hurley*, 1995 WL 854478 at *15 (citing *Verde v. City of Philadelphia*, 862 F. Supp. 1329, 1337 n.5 (E.D. Pa. 1994) (Title VII); *Catalane v. Gilian Instrument Corp.*, 271 N.J. Super. 476, 499-500, 638 A.2d 1341, (App. Div.), *cert. denied*, 136 N.J. 298, 642 A.2d 1006 (1994) (NJLAD)). Judge Irenas's holding in *Hurley* was subsequently affirmed by the Third Circuit, *see* 174 F.3d 95 (3d Cir. 1999), and *cert. denied*, 529 U.S. 1074,120 S. Ct. 786, 145 L. Ed. 2d 663 (2000).

very early on in this case, that Plaintiffs' case was without any factual or legal merit. Despite this clarity, Petitioner continued with this litigation unreasonably, vexatiously and in bad faith.

Finally, there is no support for Petitioner's argument that the lower courts' decisions "undermine the purpose of summary judgment." *See Pet.* at p. 15. There is nothing in Fed. R. Civ. P. 56, the Comments to the Rule, or precedent discussing the rule that says – or implies – that an attorney may continue an action that he knows to be without factual and legal basis.

B. Petitioner's Due Process Rights Were Not Violated

Petitioner claims, without support, that his due process rights were violated. *See Pet.* at p. 18. Prior to the imposition of fees pursuant to 28 U.S.C. § 1927, the court must give the attorney notice that fees are being considered and an opportunity to be heard. *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 570 (3d Cir. 1985); *Jones v. Pittsburgh Nat. Corp.*, 899 F.2d 1350, 1357 (3d Cir. 1990).[15] There was no violation of due process here. Petitioner was given notice that the District Court was considering ordering fees against him personally pursuant to 28 U.S.C. § 1927 and was given an opportunity – after oral argument – to submit a supplemental brief on that specific issue. Petitioner submitted a letter brief addressing that issue on March 2, 2001. (JA 54) Further, he was clearly given notice and an opportunity to be heard. (JA 41; JA 768).

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15. Petitioner claims, without explanation, that the Third Circuit's imposition of fees "fl[ew] in the face" of the precedent set in *Jones* (*Pet.* at p. 10). However, it is clear that Petitioner was specifically aware that the court was considering awarding fees against him pursuant to 28 U.S.C. § 1927.

Furthermore, Petitioner's requests for discovery[16] on tangential issues was properly denied. Petitioner's request for discovery in his opposition brief was "in light of issues of fact as to whether the services claimed to have been rendered were in fact rendered." (JA 606). The reason for this request was the inadvertent inclusion of the name of Sharon Miller, an employee of the Housing Authority, as one of the witnesses interviewed by counsel on the time records submitted in support of Respondents' application. (JA 606). However, counsel for the Respondents provided an affidavit that stated that he had inadvertently included Ms. Miller's name on the time records, and although he had intended to meet with her on the date in question, she was unavailable. (JA 724). Counsel also stated, under oath, that the amount of time on the records provided was correct and that the services had in fact been provided. (JA 724). In its written opinion, the District Court stated:

> I find this explanation entirely reasonable. Indeed, the fact that Van Syoc would have this Court and Defendants engage in further discovery on this particular claim which is based on a typographical error of no consequence, when there is no evidence in the record whatsoever to support an inference that counsel for Defendants falsified their billing records, and the error did not actually affect the amount billed,

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16. Petitioner claims he sought discovery "over the identities of some of the lawyers appearing on the defendant Housing Authority's fee application." *Pet.* at p. 17. This claim is not supported by the record and no such discovery was requested. The only discovery requests by Petitioner were those discussed by the district court and discussed briefly herein. Moreover, the District Court reduced Respondents' fee petition, in part, because certifications about the hourly rates of some attorneys on the bills were not included thereby addressing Petitioner's only potentially viable challenge.

> *is but further evidence of Van Syoc's vexatious approach to this litigation.* [Emphasis added]

Murphy Fees, 158 F. Supp. 2d at 453 n.4.

The only other request for discovery, made at the oral argument, was unrelated to the time records, but was Petitioner's attempt to obtain Respondents' counsel's evaluations provided to its insurance carrier.[17] This request related to the attorney-client communication attached as Appendix D to the Petition and discussed in Section I above. In any event, the transcript makes clear that the privileged communication played no part in the District Court's decision, and thus is irrelevant. (JA 53).

Petitioner's statement at oral argument that this request goes to "what was going on inside my head, what was going on inside Mr. Ercole's head" further supports the absurdity of his request. (JA 53). How could an attorney-client correspondence between defense counsel and their carrier provide any insight as to "what was going on inside [Petitioner's] head"? As the Court properly found, "what was going on inside Mr. Ercole's head" is completely irrelevant. The fact is that Petitioner's continuance of this action, after it was clear that the claims had no merit either factually or legally, was unreasonable and vexatious and the District Court properly awarded sanctions and the Third Circuit properly affirmed that order.

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17. At oral argument, Van Syoc stated:

> We have asked for discovery, if the Court's inclined to give them sanctions. I know they claim that there are other letters that apparently take the opposite position where apparently they did claim to the carrier that the matter was frivolous. I don't have a problem with the Court seeing those, although I think we're entitled to see them if it is going to be a basis for an imposition of fees.

(JA 52).

Riding v. Towne Mills Craft Centre, Inc., 764 A.2d 1004 (N.J. 2001), cited at page 18 of the Petition does not compel discovery or raise any question about the propriety of the lower courts' decisions. *Riding* involved a plaintiff who had failed to request attorney's fees and costs as part of a voluntary arbitration of an age discrimination case. *Id.* The intermediate appellate court held that plaintiff could still recover the fees and costs and the defendant could request a trial de novo. One issue raised in dissent was that the defendant could not decide whether or not to request a trial de novo because the attorney fee issue was left open. *Id.* at 1006. The New Jersey Supreme Court addressed that argument by saying "attorneys generally are able to estimate an adversary's fee request. If necessary, the parties to the arbitration would not be precluded from seeking abbreviated discovery to facilitate the estimate. . . ." *Id.* at 1011. *Riding* is irrelevant to this matter because Petitioner never challenged the amount of the fees requested by Respondents before the District Court. *Murphy Fees*, 158 F. Supp. 2d at 453. Furthermore, the discovery Petitioner sought did not relate to the amount of fees claimed, but only tangential issues.

C. The Amount of Fees Ordered was Appropriate[18]

Even if Petitioner had preserved his challenges as to the amount of the fees and costs awarded, which he has not, those

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18. Petitioner waived any challenge to the amount of fees sought by the Respondents when he failed to contest them at the District Court level. *See Murphy Fees*, 158 F. Supp. 2d at 453; *Paramount Aviation Corp. v. Augusta*, 178 F.3d 132, 149 (3d Cir. 1999), *cert. denied*, 528 U.S. 878 (1999) (where the appellant never attempted to rebut the calculation of amounts due before the District Court, he could not do so on appeal); *Barnes v. American Tobacco Co.*, 161 F.3d 127, 155 n.36 (3d Cir. 1998), *cert. denied*, 526 U.S.

(Cont'd)

challenges should be rejected. The District Court properly awarded fees and costs from the date the motion for summary judgment was filed (August 17, 1998) through the date the District Court granted the motion and dismissed all of Plaintiffs' claims (January 27, 1999). The District Court properly applied the standards set forth in *Browning v. Kramer*, 931 F.2d 340 (5th Cir. 1991). Contrary to Petitioner's claims, Respondents were forced to do far more than merely file a reply brief. Until the motion for summary judgment was granted, this case was active and Respondents (and Plaintiffs) continued preparing the case for trial. Respondents were simply complying with the District Court's scheduling order and the local rules of civil procedure.[19] Respondents' counsel was duty-bound to represent his clients and to comply with the District Court's scheduling order and the local rules of civil procedure regardless of whether he felt Plaintiffs' claims had merit.

(Cont'd)

1114 (1999) (appellant waived claim that report contained typographical error, where the issue was not raised below); *Abraham v. Raso*, 183 F.3d 279, 299 (3d Cir. 1999) (issue that was not raised before the District Court is waived); *see also Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 139 (3d Cir. 2000) (where issue was not raised below, it has been waived). Despite this waiver, Petitioner challenges the size of the Third Circuit's award, so Respondents will briefly address those claims.

19. Petitioner's claims that Respondents spent too much time preparing for trial are without merit. The amount of time expended by Respondents in preparing for trial was increased because of Petitioner's unreasonable and vexatious behavior, including numerous requests for continuance of the trial date requiring repetitive trial preparation and identifying 50 trial witnesses, 321 exhibits to be offered at trial and 14 separate legal issues in his pre-trial order. (Add. at 059-075). Conversely, the Respondents identified a total of six witnesses (three of which were named parties) (Add. at 053-055) and ten exhibits. (Add. at 081).

CONCLUSION

Respondents respectfully submit that the Petition for a Writ of Certiorari presents no genuine issues worthy of United States Supreme Court review, and urge the Court to deny certiorari.

Respectfully submitted,

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